Linking Efficiency with Fundamental Rights in the Dublin System: the Case of Mengesteab

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On 26 July 2017, the Grand Chamber of the Court of Justice of the European Union (CJEU) confirmed that the 2013 revision of Regulation (EU) No 604/2013 (the Dublin Regulation) expanded the grounds on which applicants for international protection can challenge transfer decisions, and that Member States must carry out responsibility determination processes promptly. In case C-670/16, *Mengesteab v Bundesrepublik Deutschland*, the CJEU ruled that an applicant can challenge a transfer order based on the expiry of the three-month deadline laid down in article 21 of the Dublin Regulation for a Member State to submit a "take charge" request to another Member State; that a take charge request must be submitted no more than three months after the lodging or making of an application for international protection, a time frame not extended by the two months allowed for making a take charge request following a Eurodac hit; and that this three month period begins when information from any document "prepared by a public authority and certifying that a third-country national has requested international protection" reaches the agency responsible for determining responsibility under the Dublin Regulation.

This decision has two significant consequences for Member States. First, applicants have a right to challenge the procedural steps by which Member States arrive at decisions regarding responsibility for protection applications to insure their fidelity to the rules prescribed in the Dublin Regulation. Second, the duty of Member States to begin assessing which state holds this responsibility engages as soon as the competent authority identified pursuant to article 35(1) of the regulation becomes aware of a request for international protection.

What is the case about?

Tsegezab Mengesteab, an Eritrean national, requested asylum in Munich on 14 September 2015. He received a certificate of registration as an asylum seeker, then a second such certificate on 8 October from the Central Immigration Authority in Bielefeld. On or before 14 January 2016 one of these certificates, or the main information it contained, reached the Federal Agency for Migration and Refugees (BAMF). Mr Mengesteab had a hearing before the BAMF on 22 July, where he lodged an application for asylum. On 19 August, BAMF found that Italy had entered Mr Mengesteab's fingerprints into the Eurodac database and issued a take charge request to Italy. Italy did not respond.

BAMF declared Mr Mengesteab's application inadmissible and ordered him deported to Italy. Mr Mengesteab challenged that decision before the Verwaltungsgericht Minden, which suspended the order on 22 December. Mr Mengesteab argued that article 21(1) of the Dublin Regulation requires the BAMF to make any take charge request within three months of his first, informal request for asylum. The BAMF argued that the time limits in the Dublin Regulation are not susceptible to review at applicants' initiative, and further that the time limits only begin to run after a formal application is lodged. The Verwaltungsgericht referred eight questions to the CJEU.

Who can invoke provisions from the Dublin Regulation?

The Minden court first asked if an applicant for international protection may invoke the expiry of the period indicated in article 21(1) of the Dublin Regulation for making a take charge request, to place responsibility with the requesting Member State. The third question asked if, assuming the answer to the first question is "yes," this is still the case if the requested Member State would be willing to accept responsibility.

In answering the first question, the CJEU emphasised that the right to an effective remedy stated in article 27(1) of the Dublin Regulation extends to ensuring that take charge and take back procedures adhere to the applicable

rules specified. The court referred to its conclusion in case C-63/15 *Ghezelbash* that the EU legislature intended to involve the applicant in the application of the Dublin Regulation, and added that recital (9) of the 2013 version expressed the intent to improve the Dublin system inter alia by enhancing the protections available to applicants. In that light, according to the court, it is clear that an applicant has the right to appeal against a transfer decision by claiming that the time limit specified in article 21(1) was breached. The CJEU therefore answered to the Minden court that an applicant may contest a transfer decision based on the expiry of that time limit, and that this remains true even if the requested Member State is willing to take responsibility.

This reinforces the conclusion of *Ghezelbash* that the rule of case C-394/12 *Abdullahi*, whereby an applicant could only contest a transfer decision on grounds of systemic problems in the asylum system of the receiving state, did not survive into the 2013 version of the regulation. The *Ghezelbash* court based this conclusion on the absence of any link between the protections in article 27 and the rule in article 3(2) that prohibits transfers to Member States whose asylum or reception systems suffer from systemic flaws that endanger fundamental rights, and also from new language included in recital (19) of the 2013 regulation. That recital now clarifies that an applicant's right to "an effective remedy against [transfer] decisions" includes the right to challenge the application of the regulation.

The *Mengesteab* court re-emphasised and expanded on this rule of *Ghezelbash*. Because the CJEU built the *Mengesteab* and *Ghezelbash* judgments on general implications of the 2013 amendments, presumably the implications extend beyond the specific articles discussed in those judgments. For example, it is surely the case that an applicant could raise the same objections to a "take back" proceeding as *Mengesteab* allowed in the "take charge" context. The CJEU would presumably also allow applicants to challenge the application of the discretionary clauses if the deadlines specified in 17(2) were not met, or if Member States receiving take charge requests incorrectly followed the rules of article 22 in assessing "proof" and "circumstantial evidence" submitted in support of those requests, because the results of these decisions could affect them materially by resulting in a transfer. It is less clear that applicants could seek to nullify transfers based on factors such as violations of privacy pursuant to the confidentiality rules of articles 31, 32, 34 or 38, for example, or on technicalities such as Member States using incorrect forms to exchange information under articles 20(3), 23(4) or 24(5).

Time limits – or: will Dublin speed up?

Having found that an applicant may appeal against a Dublin transfer based on the time limits specified in article 21(1) of the regulation, the CJEU turned to the Minden court's fourth question, regarding the relationship between the two time limits in article 21(1). That provision specifies first that a take charge request must be made within three months of an application being lodged, and second that if Eurodac shows a "hit" (i.e. the applicant's fingerprints are in the database) then the request must be sent within two months of the hit. The Minden court asked whether a Member State may issue a take charge request more than three months after an application is lodged, if it is still issued less than two months after the Eurodac hit is received.

The CJEU answered that the two months allowed after a Eurodac hit may not result in a take charge request being issued more than three months after the application is lodged. In such a circumstance, responsibility rests with the Member State where the application was lodged. The court based this conclusion on the plain words of article 21(1) and the context and purpose of article 21. The context is that a hit supplies evidence of an irregular crossing of an external EU frontier. This simplifies the assignment of responsibility, making a shorter deadline for a take charge request reasonable. The article's purpose is to facilitate rapid processing of applications, an objective of the entire regulation, as indicated for example in its recital (5). The AG reasoned similarly, noting also that articles 23, 24 and 25 of the regulation reduce the time for a take back request, giving a further indication of the general rule that a Eurodac hit should shorten, not extend, the time period for assigning responsibility. The answer to the fourth question is therefore that if a Member State issues a take charge request, it must do so within three months of the application being lodged, or within two months of a Eurodac hit, whichever is sooner.

The final question the CJEU answered asked what event establishes that an application has been lodged, and thus that the three months allowed for making a take charge request have begun to run. Under article 20(2) of the regulation, an application is lodged "once a form submitted by the applicant or a report prepared by the

authorities has reached the competent authorities of the Member State concerned." Mr Mengesteab received a certificate attesting to his status as an applicant for international protection in September or October 2015. The BAMF received notice of this by January 2016. Mr Mengesteab's formal application for asylum entered the BAMF systems in July 2016, and the take charge request was issued in August. If the application was lodged in the sense of article 20(2) when BAMF became aware of Mr Mengesteab's protection request, then the take charge request came too late and Germany became the responsible Member State. If the application was lodged only in July 2016, then the request was timely, and Italy's lack of response left Italy responsible.

On this question, the court and the AG came to divergent conclusions. The AG observed that the Dublin regulation "does not itself define what constitutes 'lodging' an application", and turned to the Asylum Procedures Directive for guidance. Article 6 of that directive refers both to making an application and to lodging it, but does not define lodging. The AG concluded based on this lack of specificity, and on the absence in some Member States of a procedural step analogous to Germany's practice of acknowledging a request for international protection prior to lodging it, that national rules determine when an application is deemed to have reached the competent authority. In the AG's view, Mr Mengesteab's application was lodged in July 2016 when the BAMF formally accepted it.

The CJEU disagreed. Rather than analysing the procedures outlined in the Dublin Regulation as meant to cohere with the other instruments of the CEAS, the court treated the Dublin Regulation and the Asylum Procedures Directive as distinct. In the Dublin context, the court emphasised the importance of quickly recognising that an application has been lodged, to avoid for example delays in uniting unaccompanied children with family members, or confusion over which Member State holds responsibility if the applicant moves to another Member State after the first notice of a protection request but before its formal lodging. The court observed that the preparatory materials for the original Dublin Regulation and its predecessor the Dublin Convention indicate that an application is "lodged as soon as the asylum seeker's intention has been confirmed with a competent authority". The CJEU thus answered the Minden court's fifth question by stating that an application is lodged for the purpose of article 20(2) of the regulation "if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation", or if that authority receives notice of "the main information contained in such a document". The CJEU did not address the possibility that an authority such as the BAMF might have constructive knowledge of an application, which leaves open the possibility that applicants might bear the burden of proving that actual information reached the authority.

Conclusion

In case C-670/16 *Mengesteab*, the CJEU stated two important rules for the operation of the Dublin system. First, it confirmed that the rule of *Abdullahi*, that an applicant for international protection may only contest a Dublin transfer on the ground of systemic deficiencies in the asylum or reception systems of the receiving state, is no longer valid. The 2013 amendments, intended to enhance both the efficiency of the system and the protections available to applicants, enabled applicants to also appeal against a transfer on the basis of Member States incorrectly applying the Dublin responsibility determination criteria (*Ghezelbash*) and the accompanying deadlines (*Mengesteab*). The court's reasoning seems to indicate that this right is not confined to article 21(1) and to the application of the responsibility determination criteria discussed in *Ghezelbash*, but potentially extends further aspects of the process for determining responsibility.

The second important outcome of this case for the operation of the Dublin system is the ruling that an application is lodged as soon as the competent authority receives notice of the existence of a document stating the person's intent to request protection. In the German context, this means that fingerprinting, Eurodac inquiries and examination of whether another Member State might be responsible should commence soon after issuance of the first registration documents (article 20(1)). Applicants must also be informed at that time of the Dublin rules and their rights under those rules (article 4), and if detained during the responsibility determination process, may remain in detention for a maximum of one month until a take charge or take back is issued, plus up to two weeks for a reply (article 28(3)). All of these events are triggered when an application is "lodged".

SUGGESTED CITATION McDonough, Paul: *Linking Efficiency with Fundamental Rights in the Dublin System: the Case of Mengesteab, VerfBlog,* 2017/8/14, http://verfassungsblog.de/linking-efficiency-with-fundamental-rights-in-the-dublin-system-the-case-of-mengesteab/.